Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No.: 79-1484

LEO JOSEPH SAITTA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 21, 1980

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Leo Joseph Saitta respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 21, 1980.

Opinions Below

The opinion and order of the Court of Appeals, not yet reported, appears in the appendix hereto at page 1a. The Magistrate's report and recommendation on petitioner's pre-trial suppression motion is in the appendix at page 7a. On page 19a of the appendix is the order of the District Court approving and adopting the magistrate's report as the opinion and order of that court.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 21, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Fourth Amendment allow a Court to disregard a defendant's attack on the illegality of certain allegations contained in an oral search warrant affidavit if the Court finds sufficient allegations based on lawfully obtained information?

2. Whether a warrantless telescopic and binocular search is violative of the Fourth Amendment?

Constitutional Provisions Involved in the Case

1. United States Constitution, Amendment IV; The right of the people to be secure in their persons, houses, propers and effects against unreasonable search and seizures shall not be violated.

Statement of the Case

On April 27, 1978 Steven Iannucci, a special agent with the United States Secret Service, while working in an undercover capacity, was introduced to Leo Joseph Saitta in Brooklyn, New York. At that time Saitta agreed to sell Special Agent Ianucci counterfeit currency in an amount of one hundred thousand dollars ($100,000.00) consisting of counterfeit ten and twenty dollar Federal Reserve Notes on the condition that Special Agent Iannucci agree to finance the printing operations. Several telephone conversations occurred thereafter wherein Saitta and Special Agent Iannucci discussed flight plans to Jacksonville, Florida and the financing of the printing.

On April 28, 1978 Special Agent Iannucci, while working in an undercover capacity and his true identity as a Secret Service Agent still unknown to Saitta, met Saitta at the Jacksonville Beach Holiday Inn in Jacksonville, Florida. At this meeting Saitta stated that he needed one thousand dollars ($1,000.00) to purchase the paper, ink and other supplies to cover the various expenses incidental to the printing of the counterfeit. These discussions resulted in Special Agent Iannucci giving Saitta $700.00 in genuine currency for that purpose.

On April 29, 1978, Saitta flew under the name Robert Gussoni from Jacksonville, Florida to Atlanta, Georgia arriving in Atlanta at 9:20 a.m. Saitta was kept under surveillance on this flight by Secret Service Special Agent Glen Garbis who had also boarded the flight in Jacksonville. Upon arrival in Atlanta, Secret Service agents continued to maintain their surveillance of Saitta. Westfall, who had been under surveillance as a result of prior investigation in this case, was observed leaving his business, J & C Graphics Company, at 1168 Richard Road, Decatur, Georgia (which is in the Northern District of Georgia) at approximately 10:05 a.m. on April 29, 1978. Westfall thereafter arrived at Hartsfield International Airport, Atlanta where he met Saitta. Saitta and Westfall got into Westfall's jeep, stopped at several banks, and at 11:47 a.m. on April 29, arrived at J & C Graphics. Westfall was a tenant at that location and proprietor of J & C Graphics which was a commercial printing concern.

From 11:47 a.m. and continuing until 11:07 p.m. on April 29, surveillance was maintained by Secret Service agents at J & C Graphics from a fixed surveillance unit, passing automobile, bushes approximately 130 feet across the street, and from various other locations in the area. During this surveillance, Special Agents James Beary and Steven Schenk observed Westfall and Saitta on the premises at J & C Graphics. Special Agents Beary and

Schenk would testify that they were able to view negatives of backs of ten and twenty dollar Federal Reserve Notes mounted on layout sheets from their place of surveillance. At one point Westfall was observed holding said negatives up to the light, and Saitta was observed looking on while Westfall was holding them.

Saitta remained at J & C Graphics from 11:47 a.m. until the search warrant was executed at 11:07 p.m. on April 29. Westfall left the premises of J & C Graphics on several occasions for short periods of time but would then return. Westfall did not leave the premises from 7:32 p.m. until his arrest later that evening.

Application for a search warrant was made by telephone by Special Agent-in-Charge J.D. Kivett to the Honorable Joel M. Feldman, United States Magistrate, on the evening of April 29. Judge Feldman granted said search warrant application at 9:46 p.m. that evening.*

Thereafter at 11:07 p.m. said search warrant was executed by Special Agents of the Secret Service on the premises of J & C Graphics. The agents went to the front door, identified themselves verbally as Secret Service agents and put their Secret Service credentials flush against the glass door. The door was locked. Saitta and Westfall were standing by the printing press when the agents identified themselves. Upon observing the agents, both moved out of view of the agents. The agents broke through the locked glass door and entered the premises.

On the printing press were found eight hundred sheets of ten and twenty dollar counterfeit Federal Reserve Notes (backs only) actually being printed as the agents entered.

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*Issuance of a warrant based upon sworn oral testimony communicated by telephone is authorized by Fed. R. Crim. P. 41(1)(2).

Prior to trial petitioner moved to suppress all evidence seized pursuant to the warrant. In response the Magistrate issued a report recommending that the motion be denied. Based on this report the District Court denied Petitioner's suppression motion and incorporated the report as the opinion and order of the Court. Subsequently Petitioner entered into a stipulation of facts with the Government upon which Chief Juge Charles A. Moye, Jr., sitting without jury, based his conclusions of law and fact. Petitioner was adjudged guilty of committing various counterfeiting offenses and of conspiring to commit those offenses in violation of Title 18 U.S.C. §§ 471, 472, 474 and 371.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Improperly Held That a Search Warrant May Be Issued Based on an Oral Affidavit Containing Both Lawfully and Unlawfully Obtained Information.

The finding by the Court of Appeals that the sworn oral testimony communicated by telephone to the United States Magistrate that contained unlawfully obtained information (see *infra* at page 2a) was sufficient to support the issuance of the warrant was, it is submitted, an erroneous application of Fourth Amendment law.* It is petitioner's contention that adherence to the rule enunciated by the Fifth Circuit contravenes fundamental constitutional principles, and perpetuates an already

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*The information relayed to the Magistrate and relied upon by the Court of Appeals in support of the warrant is contained within the Court's opinion at page 2a of the appendix.

existing conflict among the Circuits. *Compare United States v. Williams*, 594 F.2d 86, 95 n.17 (5th Circuit 1979) *with United States v. Langley*, 466 F.2d 27, 35 (6th Cir. 1972) ("[W]here such tainted information comprises more than a *very minor portion* of that found in an affidavit supporting a warrant to search, the warrant must be held invalid." (Emphasis in original.)) In the context of this case it is apparent that the fruits of the telescopic search constituted more than a "very minor portion" of the oral affidavit. Therefore, under the rationale of *Langley* the warrant should be invalidated due to its disproportionate reliance on the illegally obtained evidence.

Since this Court has yet to rule on this important issue and since there is indeed conflict among the Circuits certiorari should be granted. *See United States v. Giordano*, 416 U.S. 505, 554-56, 94 S.Ct. 1820, 1845 (1974) (Powell, J., concurring in part and dissenting in part). In addition, under any analysis Petitioner contends that the contents of the oral affidavit were insufficient to rise to the level of probable cause.

II

By Erroneously Holding That Unlawfully Obtained Information May Be Disregarded the Court of Appeals Improperly Declined to Rule That a Warrantless Telescopic and Binocular Search Violates the Fourth Amendment.

Although the issue presented by this portion of the petition was fully briefed and argued by petitioner, the Court of Appeals declined to reach it in rendering its decision affirming petitioner's conviction. Petitioner contends however that since the court erroneously held the oral application for the warrant contained sufficient

lawful information, this Court should consider the alleged illegality of the search.

By upholding the Magistrate's report that the search did not violate the Fourth Amendment the District Court decision denying petitioner's suppression motion disregarded the mandates enunciated by this Court. Under the doctrine enunciated in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) it is clear that one has a reasonable expectation of privacy to be free from warrantless governmental intrusion if one takes reasonable precautions to ensure that privacy. In this regard the evidence clearly supported a finding that Petitioner had an expectation of privacy that society would deem to be reasonable. Therefore in this case petitioner asserts that, as a matter of law, no warrantless aided visual search is reconcilable with the Fourth Amendment.

Certiorari is important in this case since the issue presented is yet to be decided by this Court or any Circuit Court of Appeals. The available case law, often conflicting, is from relatively few District and State Courts. Furthermore, the question is critical to determining the extent to which the criminal justice system will take heed of increasing advances in technology and how those advances affect the rights of criminal defendants.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Docket No. 79-5055

Feb. 21, 1980

UNITED STATES of America,
Plaintiff-Appellee,

v.

Leo Joseph SAITTA and James Patrick Westfall,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

GODBOLD, Circuit Judge:

The defendants were convicted of counterfeiting offenses. 18 U.S.C. §§ 471, 472 and 474. Secret Service agents surveilled defendants at a one-story commercial printing shop owned by Westfall and located in a group of several small commercial establishments. During night hours, using 9-power binoculars and a 20-power hand-held telescope that could zoom to 40-power (both were commercially available), the agents observed defendants through a gap between the blinds covering the front windows of Westfall's shop. The windows opened onto the sidewalk in front of the building. The agents saw them examining layout sheets containing negatives of counterfeit Federal Reserve notes. This magnified observation was part of the basis for a search warrant obtained by telephone from a U.S. Magistrate.[1] Defendants assert

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[1] Issuance of a warrant based upon sworn oral testimony communicated by telephone is authorized by Fed.R.Crim.P. 41(c)(2) (effective October 1, 1977).

that this mechanically assisted viewing of the interior of the print shop was a violation of the Fourth Amendment—that in itself was an unlawful search and also could not be used as part of the basis for the search warrant.[2]

[1] It is not necessary that we decide this issue because we conclude that the warrant was valid even without the fruits of the observation through the telescope and binoculars.

Following is a transcript of relevant parts of the telephone conversation between Secret Service agent Kivett ("K") and Magistrate Feldman ("F").

K: OK, on 4/28/78, a Leo Joseph Saitta, told a Special Agent of the Secret Service, who was operating in an undercover capacity, that he, Saitta, was going to have counterfeit currency printed and would sell it to the agent. The agent

[2] Defendants rely principally upon *U.S. v. Kim*, 415 F.Supp. 1252 (D. Hawaii 1976)(observation into defendant's apartment and of his balcony, conducted from 160 feet away, and ¼ of a mile away, through telescope and binoculars, held an invalid search; similar observation of those walking from elevator to defendant's apartment, by way of an outdoor terrace, held not invalid). *See also, People v. Arno*, 90 Cal.App.3d 505, 153 Cal.Rptr. 624 (1979). *Contra, On Lee v. U.S.*, 343 U.S. 747, 754, 72 S.Ct. 967, 96 L.Ed. 1270, 1276 (1952)(dicta); *Fullbright v. U.S.*, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830, 89 S.Ct. 97, 21 L.Ed.2d 101 (1968); *Hodges v. U.S.*, 243 F.2d 281 (5th Cir. 1957); *Johnson v. State*, 2 Md.App. 300, 234 A.2d 464 (1967); *State v. Thompson*, 196 Neb. 55, 241 N.W.2d 511 (1976); *Commonwalth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914, 91 S.Ct. 886, 27 L.Ed.2d 813 (1971); *State v. Manly*, 85 Wash.2d 120, 530 P.2d 306, *cert. denied sub nom., McIntire v. Washington*, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 81 (1975); *but cf. State v. Loyd*, 435 P.2d 797 (Idaho 1967) (use of flashlight to look into car).

gave Saitta $700.00 in genuine currency, which Saitta said he was going to use to purchase ink and paper, that he would locate a printer on 4/29/78, and print up the counterfeit, which was to be delivered on the afternoon of 4/30/78. Saitta under surveillance on 4/29/78, by agents of the Secret Service, when he flew from Jacksonville, Fla., to Atlanta, Ga., where he made several telephone calls and a short time later was met at the airport by James Patrick Westfall. They drove from the airport to J & C Graphics, 1168 Richards Dr., I'm sorry, Richards Rd., Decatur, Ga., which is operated by Westfall. They entered the graphic shop at 11:47 AM, 4/29/78. Westfall has left and returned twice but Saitta is still there and they are both are [sic] there at this time. Special Agents James M. Beary, Jr. and Stephen W. Schenk have personally observed both Saitta and Westfall working on negatives of Federal Reserve Notes. They recognize these as negatives based on their years of experience as Secret Service Agents, by their size and shape, which is that of the back of Federal Reserve Notes, as indicated by the schroll and lathe work around the corners and sides. The negatives were in goldenrod paper, which is used prior to burning plates from negatives. They also observed Westfall holding up the goldenrod paper, with the negatives in it, as if checking his workmanship. SA Beary also observed goldenrod paper with cuts in it the same shape and size as the Treasury Seal and Serial No.'s on Federal Reserve Notes. In order for Saitta to have counterfeit currency ready to deliver by tomorrow afternoon, the

printing must begin immediately. It should also be noted that Westfall has been previously convicted for printing counterfeit FRN's. Agents Beary and Schenk are continuing their surveillance of Westfall and Saitta in the J & C Graphics.

* * * * * *

F: Do you have any previous information on whether or not Saitta has a prior criminal record[?]

K: Yes sir, he does have a prior criminal record, he has an FBI number, I'm not . . . don't know exactly what his record is, but he does have an FBI number so that means he would have a prior criminal record.

* * * * * *

F: And you say Westfall has previously been convicted.

K: Westfall was, has previously been convicted, yes sir, and if you will hold on one moment I can find that information for you if you'll like.

F: OK

K: Hold on.

K: I don't have the date, Judge, but it was under our Secret Service file # J-315-CO-3373-2.

F: Alright [sic], now,

K: He was arrested after passing these notes in New Iberia, Louisiana, I don't have the date.

Summarizing, here is what the magistrate knew:

—On May 28 Saitta told an undercover Secret Service agent that he would have counterfeit currency printed and would sell it to the agent.

—The agent gave Saitta $700 which Saitta said he would use to purchase ink and paper.

—Saitta said he would locate a printer on May 29 and print up the money.

—The money was to be delivered on the afternoon of May 30.

—Saitta flew to Atlanta and was met at the airport by Westfall. They went to Westfall's printing shop, arriving there at 11:47 A. M. Westfall came and went but Saitta was still there at 9:36 p. m.

—In order for Saitta to have the counterfeit currency ready to deliver on the afternoon of May 30, the printing would have to begin immediately.

—Westfall previously had been convicted for printing counterfeit Federal Reserve notes.

—Saitta had a prior criminal record.

—Westfall had been arrested after passing "these [counterfeit] notes" in New Iberia, Louisiana.

[2] These circumstances adequately established probable cause to believe that criminal activity was going on in the print shop, and, even more specifically, criminal activity related to printing or preparation for printing of the counterfeit currency that Saitta had agreed would be delivered less than 24 hours later. As a result, we need not reach the appellants' allegations regarding the binocular-telescope search, particularly where, as here, the independent information was obtained prior to the search and thus was not even arguably "fruit of a poisonous tree." *See U.S. v Giordano*, 416 U.S. 505, 554-56, 94 S.Ct. 1820, 1845, 40 L.Ed.2d 341, 375-76 (1974)(Powell, J., concurring in part and dissenting in part, joined by Burger, C.J. and Blackmun and Rehnquist, JJ.); *U.S. v. Williams*, 594 F.2d 86, 95 n.17 (5th Cir. 1979); *U.S. v. Tarrant*, 460 F.2d 701, 703-04 (5th Cir. 1972); *U.S. v. Marchand*, 564 F.2d 983, 992-94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 760 (1978);

Appendix A

Opinion of United States Court of Appeals

Howell v. Cupp, 427 F.2d 36, 38 (9th Cir. 1970); *James v. U.S.*, 135 U.S. App. D.C. 314, 418 F.2d 1150 (D.C. Cir. 1969); *U.S. v. Sterling*, 369 F.2d 799, 802 (3d Cir. 1966).[3]

AFFIRMED.

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[3] Westfall, and possibly Saitta also, contended below that the warrant was invalid because Westfall had not been convicted for counterfeiting Federal Reserve notes but had been tried and convicted in United States court in Corpus Christi, Texas, for the offense of interstate forgery. The record at the motion to suppress hearing showed that Westfall had been charged with possessing and passing counterfeit currency but that the complaint was dismissed and that he pleaded guilty to the charge of interstate forgery. Kivett's statement to the magistrate was based upon a teletype from the San Antonio, Texas, office of the Secret Service which indicated that Westfall had been convicted of counterfeiting. Relying upon *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the district court held that the erroneous statements by the magistrate concerning Westfall's conviction were not made knowingly or intentionally or with a reckless disregard of the truth, and that even without the statement that Westfall had been convicted of counterfeiting the information given by Kivett established probable cause. Neither defendant raises on appeal Kivett's misstatement as a basis for invalidating the warrant. Nevertheless, since we base our decision upon examination of the adequacy of probable cause without the fruits of the aural observation, we consider the sufficiency of the information before the magistrate without including the erroneous statement that Westfall had been convicted of counterfeiting, and hold that it was adequate.

Appendix B

Opinion of United States District Court

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. C78-179A

UNITED STATES OF AMERICA

-vs-

JAMES PATRICK WESTFALL,
LEO JOSEPH SAITTA

MAGISTRATE'S ORDER AND
REPORT AND RECOMMENDATION UPON
DEFENDANTS' PRE-TRIAL MOTIONS AND
FINAL CERTIFICATION

Defendant James Patrick Westfall is charged in each count of a twelve count indictment and Defendant Leo Joseph Saitta is jointly charged in seven of the twelve counts with having willfully, knowingly, and with intent to defraud the United States counterfeited and conspired to counterfeit obligations of the United States, that is Federal Reserve Notes, drawn on the Treasurer of the United States, as well as possession of said notes and the implements to make them, in violation of 18 U.S.C. §§ 471, 472 and 474. The matter is presently before the Magistrate for consideration of several pre-trial motions filed by the defendants.

MOTION FOR DISCOVERY AND INSPECTION

The Government indicates in its response to defendants' various motions that it has complied with Rule 16 of the Fed.R.Crim.P. as well as this Court's Local Rule 190 (191.2) in allowing the defendants to discover and

inspect Rule 16 materials in the Government's possession. While there is no requirement for an Order on this matter at this time, the Government and the defendants are reminded that they have a continuing obligation to furnish to each other any additional materials that may come into their possession.

MOTIONS TO SUPPRESS

Each of the defendants moves to suppress any and all evidence obtained by virtue of the execution of a telephonic search warrant issued by Magistrate Feldman on the night of April 29, 1978, at the premises of J & C Graphics, Inc., 1168 Richards Road, Decatur, Georgia. Defendants contend that the facts communicated to the Magistrate on the issue of probable cause for the issuance of the warrant were illegally obtained by the Government in violation of the defendants' Fourth Amendment rights to freedom from unreasonable search and seizure. Defendants further contend that the Government agents orally communicated information to the Magistrate which was untrue and that said communication was made willfully and intentionally on the part of the Government agents.

Underlying Facts

Prior to April 29, 1978, the date of the arrest, the Atlanta office of the Secret Service had received information concerning defendant Saitta in connection with alleged counterfeiting activity. In March 1978, co-defendant Saitta had passed a quantity of counterfeit $10 and $20 Federal Reserve Notes to an undercover Secret Service agent. (Transcript of July 21, 1978 [hereinafter referred to as TR II], page 38). Following that exchange, Saitta agreed to deliver an additional sum of counterfeit notes

to undercover agents in Jacksonville, Florida, on April 30, 1978. (TR II, 38). Saitta flew to Jacksonville, Florida, on April 28, 1978, to meet with said agents who delivered $700 to Saitta to cover the expenses to be incurred in the printing of the counterfeit paper. (TR II, 39). The next day, on April 29, 1978, Saitta flew to Atlanta arriving at Hartsfield International Airport in the morning. (TR II, 40). It was at this point that surveillance by the Secret Service began. Observation revealed that after Westfall met Saitta at the airport, they proceeded directly to the J & C Graphics Company at 1168 Richards Road, Decatur, Georgia, where they arrived at approximately 11:45 a.m. (TR II, 36). The building in which J & C Graphics was located, is a single story, glassed front structure, housing three businesses open to the public. The lots adjacent to this commercial structure were either vacant, undeveloped or residential properties. (Defendant's Exhibits M2-7 and 15). The entrance door to the shop was a regular aluminum framed door with see-through smoked glass, and the windows were clear glass but covered by transparent fixed-position blinds. There was a walkway along the entire length of the building as well as a blacktop parking lot between the front of the building and Richards Road. A surveillance team lead by Special Agents Beary and Schenk was set up immediately and kept its vigil until 11:07 p.m. when the search warrant was executed. Agents Beary and Schenk initially conducted their surveillance in an automobile by occasionally cruising past the store. (TR II, 40). Eventually, at approximately 8 p.m., the two agents took up concealed positions in a wooded area estimated to be 130 feet across the street from the front entrance of J & C Graphics. (Transcript of July 20, 1978, [hereinafter referred to as TR I], Page 73). Although they were unable to see into the store during the daytime

surveillance; after nightfall, because of the contrasting brightly lit interior they were able to view defendants' activities from their concealed vantage point. Some observations of the premises were conducted with the assistance of binoculars which were rated at nine power and a twenty power telescope which could zoom to forty power (TR I, 75-76). Agent Beary has stated that although they could make out the outlines of objects and persons in the J & C Graphics Store front through the transparent blinds, it was exclusively through a gap in the non-abutting blinds draping the store front windows that the evidence indicating the actual manufacture of counterfeit money was seen. The gap was purportedly wide enough to afford an unobstructed full view of defendants (TR I, 66-67).[1] Agent Beary further testified that he was able to see details of a negative lithograph through this opening in the blinds, which in his expert opinion included lathe work and style work resembling that contained on a genuine Federal Reserve Note (TR I, 81, 99). All of defendants' activities which were later recounted to justify the search warrant were conducted in the glassed wall front right room of J & C Graphics. After gathering this information Agent Beary forwarded this information to Special Agent Kivett who was stationed at the Atlanta office of the Secret Service. Agent Kivett in turn informed Judge Feldman via telephone of the activities Agent Beary had witnessed. In addition, Judge Feldman was informed of co-defendant Westfall's past criminal record and co-defendant Saitta's

[1] The actual gap between the two separate blinds remained very much in dispute throughout the evidentiary hearing. Neither of the two Secret Service Agents who testified could agree upon the actual gap width between the two units. Nor is there any agreement between the agents and defendant Westfall and defense witness Frazier.

previous contacts with undercover Secret Service Agents. (Search Warrant, Defendant's Exhibit M-19). Agent Kivett represented that in 1970 defendant Westfall had been convicted for printing and passing counterfeit Federal Reserve Notes in Texas.[2] Based upon all the factors contained in the sworn telephonic statement, Judge Feldman issued a telephonic search warrant at 9:46 p.m., April 29, 1978. This warrant was executed at 11:07 p.m. by the Secret Service at the premises of J & C Graphics.

Use of Binoculars and Telescope

Defendants here contend that the use of binoculars and a telescope by FBI agents in conducting a surveillance of the business location constitute a violation of their Fourth Amendment protection against unreasonable searches and seizures. Relying upon *Katz v. United States*, 389 U.S. 347 (1967) and *United States v. Kim*, 415 F. Supp. 1252 (D.C. Hawaii 1976) defendants contend that the actions of the agents constituted a warrantless search of the premises of J & C Graphics, Inc. and therefore was *per se* unreasonable. The Government takes the position that *Katz* stands for the proposition that there must first have been exhibited an actual (subjective) expectation

[2] Defendant Westfall has never been prosecuted for passing counterfeit notes by the United States Attorney's office in Houston, Texas. He has, however, been convicted of forgery in the State Court of Louisiana. Furthermore, defendant has also received a ten year sentence for interstate forgery charges from the United States District Court for the Southern District of Texas. The sentencing judge considered the counterfeiting violations when directing this federal term to be served concurrently with the state sentence (Government Exhibits M-12 and 13). Evidence supporting the federal prosecution was obtained, in part, through a consenual search of defendant's Texas residence as well as, a voluntary confession given by defendant. (Government's Exhibits M-5, 6, 7).

of privacy, and second that the expectation be one that society is prepared to recognize as "reasonable" (389 U.S. at 361).

While the District Court opinion in *Kim supra* held that evidence obtained through the warrantless use of telescopic aid should be excluded, numerous other courts have dealt with the question of the warrantless use of binoculars and telescopes to assist in surveillance and found no violation of Fourth Amendment rights. *See, United States v. Minton*, 488 F.2d 37 (4th Cir. 1973), *cert. den.* 416 U.S. 936 (1974); *Fulbright v. United States*, 392 F.2d 432 (10th Cir.), *cert. den.* 393 U.S. 830 (1968); *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. den.* 401 U.S. 914 (1971).

In *Kim supra* the defendant was observed by Government agents from a building one-quarter mile away from his building. The observations were made by the agents in the residence or apartment of Kim located on an upper floor of a high-rise apartment building. The Court there held that the evidence obtained from the telescopic surveillance of Kim's apartment and balcony should be suppressed. (415 F. Supp. at 1258). The Court went on to state that their finding related only to activities "within Kim's apartment" and that if the surveillance had been on activities on the balcony of the apartment that the Court might very well not have found any invasion of privacy.

The factual differences between *Kim supra* and the instant case are great. Here the premises under surveillance was a public business location on a public street on the ground floor with a sidewalk directly in front of the premises. The business was surrounded by other public businesses and was located in a small public shopping

area and contained a sign on the outside indicating its public nature. While the evidence indicated that there were stationary plastic blinds located in the windows of the business establishment here in question, there was no indication that these blinds had been placed over the window for privacy on this particular occasion but only that they remained in that position at all times during the operation of this business. There can be no comparison of the expectation of privacy in an apartment residence on an upper floor of a high-rise apartment and a commercial business on the street level open to the public. The evidence here further indicated that the agents were able to see equipment and persons through the blinds and that the blinds contained a gap between two sections through which a person passing on the outside walk could view the inside. The entry door to J & C Graphics, while smoke colored, was clear and visibility inside the premises was there for any member of the public to view. There does not appear in the record of the hearing of this matter any evidence that indicates that the defendants were attempting to keep from public view any of their activities in the manufacture of counterfeit Federal Reserve Notes. The photographs of the premises in this matter and the testimony of the agents indicate that what the agents saw through the binoculars and telescope could have been seen by a person walking on the sidewalk in front of the commercial premises. (TR I, pp. 98, 99).

It is difficult for this Magistrate to apply the theory of *Katz* dealing with electronic surveillance to the instant case dealing with binocular observation of material clearly visible to any member of the passing public. While one might reasonably expect privacy in a telephone conversation that same expectation would not apply while counterfeiting Federal Bank Notes in a commercial business on a public street clearly visible to all those passing.

It is the opinion of this Magistrate that the use of binoculars and a telescope by the Government agents while located in a public place did not violate the Fourth Amendment rights of the defendants. The factual differences between the instant case and those found in *Kim supra* do not require that this Court follow the *Kim* decision. The decisions in *Fulbright* and *Hernley* appear to have much more relevance to the instant facts than does *Kim*.

Misrepresentations in Affidavit to Obtain Warrant

Defendant Westfall contends that the affiant gave to the Magistrate untrue information in order to obtain the issuance of the warrant. He contends that the statement that defendant Westfall had previously been convicted for printing counterfeit Federal Reserve Notes was false. The evidence indicates that Westfall was not convicted for counterfeiting Federal Reserve Notes but was tried and sentenced in the Federal Court in Corpus Christi, Texas for the offense of Interstate Forgery. At the time of his sentence, the District Court Judge indicated that he was taking into consideration the counterfeiting violations of Westfall. The record indicates that Westfall was in fact charged with possessing and passing a counterfeited obligation of the United States but that the complaint was subsequently dismissed and he plead guilty to the charge set forth above.

The Supreme Court has held in *Franks v. Delaware*, ____ Supreme Court ____, 46 Law Week 4669 (1978) that a defendant must show that the false statements made by the complaining officer must have been necessary to a finding of probable cause and that such false statements were made knowingly and intentionally or with reckless

disregard of the truth. Here the evidence indicates that Westfall had in fact been charged with possession of a counterfeit note even though the charge had subsequently been dismissed. The Government agent was in fact relying upon a teletype from the San Antonio office of the Secret Service which indicated that Westfall had been convicted of counterfeiting. On the basis of the evidence available to the Government agent at the time there is no indication that he intentionally indicated an untrue fact to the Magistrate or that he acted in willful disregard of the truth.

If, in fact, the statement of the affiant that Westfall had been convicted of counterfeiting were stripped from the information given to the Magistrate, it is the conclusion of this Magistrate that there still remained probable cause in the remaining information sworn to at that time. The facts sworn to indicating that Saitta had made a previous sale of counterfeit notes, that Saitta had accepted funds from an undercover federal agent in order to purchase supplies for the sale of an additional $100,000 of Federal Reserve Notes, the fact that Saitta was met at the Atlanta Airport by Westfall and that the two defendants spent the day at the commercial printing premises of Westfall all constitute sufficient probable cause for the issuance of the warrant even excluding the information concerning Westfall's conviction. It is thus the opinion of this Magistrate that there remained sufficient evidence in the warrant affidavit to indicate probable cause that the search warrant should issue.

Standing

The Government takes no issue with the contention of defendant Westfall that he has standing to move for suppression of the evidence obtained in the execution of the search warrant here in question. While the Government does take issue with the standing of defendant Saitta to

question the validity of the warrant and subsequent evidence obtained thereunder because of the conclusion of this Magistrate to deny the motion to suppress it is not necessary to treat the issue of standing of defendant Saitta at this time.

DEFENDANT SAITTA'S MOTION FOR SEVERANCE

Defendant Saitta has moved for severance from co-defendant Westfall pursuant to Fed.R.Crim.P. Rule 14. Through pre-trial discovery, defendant Saitta has received a copy of a statement made by co-defendant Westfall inculpating Saitta with the crimes charged in the indictment. Defendant alleges that in light of this statement co-defendant Westfall will be unlikely to testify at trial. Furthermore, if the Government elects to introduce co-defendant Westfall's statement into the record and Westfall does not choose to testify, defendant asserts that he will be prejudiced and denied his Sixth Amendment right to confront adverse witnesses. This potential dilemma finds its origins in *United States v. Bruton*, 416 F.2d 310 (8th Cir.) *cert. den.* 397 U.S. 1014 (1969).

Remindful of the fact that severance lies within the sound discretion of the Court, defendant's motion should be denied. *United States v. Muro*, 537 F.2d 1339 (5th Cir. 1976). The problem presented by defendant is only a potential conflict that is not certain to be raised at trial. If, in fact, a *Bruton* conflict does arise, the problem may be resolved by an alternative solution of excising all inculpating references to defendant from co-defendant's statement. *Muro, supra; United States v. Dorsett*, 544 F.2nd 687 (4th Cir. 1976). The record does not support defendant's motion to sever at this time.

CONCLUSION

It is the recommendation of the Magistrate that the defendants' motions to suppress the evidence obtained under the search warrant issued on April 29, 1978 be denied for the reasons set forth above. It is further recommended that the motion of defendant Saitta to sever the trial of his action from that of co-defendant Westfall be denied at this time and until additional facts indicate the necessity of the granting of such a motion.

In all other respects this case is believed ready for trial and it is so certified at this time. The case is presently scheduled for trial on August 28, 1978 which is well within the requirements of this Court's Speedy Trial Plan and the Speedy Trial Act.

Let a copy of this Order and Report and Recommendation be served upon counsel for each of the parties.

AND IT IS SO ORDERED AND RECOMMENDED this 23rd day of August 1978.

/s/ _____
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE

Appendix B

Opinion of United States District Court

ORDER

Let a copy of this Order and Recommendation be served upon counsel for the parties. Counsel for the parties will be allowed to file objections to this Order prior to the placing of this case on trial or within ten days of this Order, whichever shall first occur. If no objections are made, this Order and Recommendation will be adopted as a record of the proceedings and may become the opinion and Order of the Court.

The Clerk is directed to submit the Order and Recommendations with objections if any upon receipt.

SO ORDERED this 23rd day of August, 1978.

/s/ _____
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE

Appendix B

Opinion of United States District Court

ORDER

On June 6, 1978, the grand jury returned a twelve count indictment charging defendant James Patrick Westfall, in each of the twelve counts, and defendant Leo Joseph Saitta, in seven of the twelve counts, with having counterfeited and conspired to counterfeit obligations of the United States and with possession of said counterfeit obligations, together with the implements to make them, in violation of 18 U.S.C. §§ 471, 472 and 474. Presently pending herein is the magistrate's report of August 23, 1978, recommending (1) that the defendants' motion to suppress the evidence obtained pursuant to a certain telephonic search warrant issued during the night of April 29, 1978, be denied; and (2) that the motion of defendant Saitta to sever the trial of his action from that of co-defendant Westfall be denied at this time without prejudice to renew it at trial.

The defendants object to the magistrate's recommendation with respect to their motion to suppress on the ground that the holding in *United States v. Kim*, 415 F. Supp. 1252 (Hawaii 1976), should control the issue of whether the agents' telescopic surveillance of their activities at the J & C Graphics Company at 1168 Richards Road in Decatur, Georgia, on the night in question constituted a violation of their fourth amendment rights. After careful review and consideration of the factual distinctions between *Kim* and the case *sub judice*, the court concurs with the magistrate's findings that the decisions in *Fullbright v. United States*, 392 F.2d 432 (10th Cir. 1968), and *Commonwealth v. Hernley*, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971), have more bearing on the facts herein than the decision in *Kim*. There are significant differences in the reasonable

expectations of privacy of those engaged in activities conducted within a residence on an upper floor of a high-rise apartment and those engaged in activities conducted within the front office of a commercial business building located on the street level and open to the public view through blinds containing a gap between two sections, or through a clear smoke-colored glass door. Further, *Fullbright* has been cited with approval by the Court of Appeals for the Fifth Circuit in a similar case. *See United States v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970). For the above reasons, the magistrate's report and recommendation should be and is hereby approved and adopted as the opinion and order of this court. Accordingly, the defendants' motion to suppress is hereby denied.

IT IS SO ORDERED this 30th day of August, 1978.

/s/ _____
WILLIAM C. O'KELLEY
United States District Judge